

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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November 6, 1992

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary of the Federal
Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: In the Matter of Amendment of the Commission's
Rules to Establish New Personal Communications
Services

GEN Docket No. 90-314
ET Docket No. 92-100

Dear Secretary Searcy:

Enclosed please find the original and eleven copies of
New York State Department of Public Service's Comments on the
Notice of Proposed Rulemaking in the above-captioned proceeding.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Penny Rubin".

Penny Rubin
Assistant Counsel

Enclosures

cc: All Parties

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the Matter of)
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Amendment of the Commission's)
Rules to Establish New Personal)
Communications Services)

MAIL BRANCH
GEN Docket No. 90-314
ET Docket No. 92-100

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE
ON THE NOTICE OF PROPOSED RULEMAKING

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Dated: November 6, 1992
Albany, New York

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COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE
ON THE NOTICE OF PROPOSED RULEMAKING

INTRODUCTION AND SUMMARY

The New York Department of Public Service (NYDPS) submits these comments in response to the Commission's Notice of Proposed Rulemaking ("Notice") to establish rules for Personal Communications Services ("PCS"). The NYDPS supports the introduction of PCS because of its potential to offer consumers significant benefits in terms of increased portability, to lower service costs and improve service quality, and to stimulate local exchange competition.

Because of uncertainties surrounding the development of PCS, however, it is premature for the Commission to establish rules for PCS. By acting in haste, the Commission may structure the PCS market prematurely and thereby unintentionally limit the full potential of these new services.

The NYDPS recommends, therefore, that the Commission issue a Further Notice of Proposed Rulemaking. This would allow the Commission to refine its proposals based on the comments submitted in this proceeding and would provide additional time for a more thorough analysis of the data from the numerous PCS trials being undertaken throughout the country.

With respect to the issues raised in the current Notice, the NYDPS favors a licensing structure for PCS which will maximize the number of potential service providers per service area. Thus, the Commission should authorize five PCS licenses per service area. As for the size of service areas, the NYDPS believes that smaller service areas than discussed in the Notice be considered. In the context of a Further Notice of Proposed Rulemaking, the NYDPS recommends that the Commission reconsider Metropolitan Serving Areas ("MSAs") and Rural Service Areas ("RSAs") as an option for PCS licensing areas.

Regarding eligibility, special restrictions should not be imposed on cellular carriers and local exchange companies. The Commission should consider, however, whether current spectrum allocation to existing service providers will allow those providers to offer PCS. If so, then current holders of cellular spectrum -- including local exchange carriers ("LECs") wishing to provide wireless local loops -- should not be eligible for PCS

licenses. Furthermore if a LEC elects to maintain a separate cellular subsidiary in the absence of a regulatory requirement to do so, the Commission should allow only the LEC or its cellular subsidiary -- but not both -- to apply for a PCS license in that LEC's local wireline service area.

Although PCS is still in its early stages of development, it is not too early to consider the privacy implications of PCS. The Commission's current proceeding provides an ideal time for the Commission to address the privacy implications of PCS, before large financial investments are made in technology which may compromise user privacy.

Based on the level of information currently available on PCS, including technical and market trails presently being undertaken throughout the country, there should be a presumption that PCS will be used to provide common carrier type services, and thus, those services should be classified as common carrier services. As for interconnection, PCS providers should be entitled to obtain a type of interconnection that is reasonable for their particular system and is no less favorable than that offered by the LEC to an affiliate, a customer or any other carrier. Finally, as a matter of fact and law, the Commission may not determine that state policies on interconnection or on intrastate PCS services will negate legitimate federal goals.

I. MORE MUST BE KNOWN ABOUT
PCS BEFORE ADOPTING RULES

The NYDPS supports the Commission's efforts to the extent that they are intended to encourage the introduction of PCS. In fact, the New York Public Service Commission ("NYPSC") recently adopted a policy statement supporting the development of PCS because of its potential to offer consumers significant benefits in terms of increased portability, lower service costs, improved service quality, and the potential to stimulate local exchange competition. (Attachment A).

Because of uncertainties surrounding the development of PCS, however, the NYPSC decided it was premature to adopt a specific set of principles or rules. Similarly in this instance, the NYDPS believes that it may be premature for the Commission to adopt federal rules for PCS. While we appreciate the Commission's desire not to delay the introduction of these promising new services to the public, we concur with Commissioner Quello that in its haste to act, the Commission's actions "may have the unintended effect of limiting the full potential of PCS applications. Consequently, the Commission may be moving to structure the PCS market prematurely." (Separate Statement of Commissioner Quello, p. 1)

Thus, we recommend that the Commission consider a

Further Notice of Proposed Rulemaking in this proceeding. This would allow the Commission to refine its rules based on the comments filed in the present Notice and would provide for a more thorough analysis of the data available from the numerous PCS trials underway throughout the country. As discussed below, we believe more information is required in particular on the appropriate size of PCS serving areas and on the privacy implications of PCS.

II. THE COMMISSION SHOULD MAXIMIZE
THE NUMBER OF PCS PROVIDERS

The Notice proposes licensing a minimum of three PCS service providers per service area, but seeks comment on the merit of authorizing four or five PCS operators per service area. As a general principle, the NYDPS supports a licensing structure for PCS that will maximize the number of potential service providers per service area, subject of course to limits on the amount of spectrum available for PCS. The greater the opportunity for entry, the more likely that competition will develop within the PCS industry, resulting in better service at lower prices for consumers. In addition, if PCS providers are to provide competition to the LECs for basic exchange telephone service, then maximizing opportunities for entry by facilities-based PCS providers may increase the potential for local exchange

competition.

Thus, the NYDPS supports the assignment of five PCS licenses per service area, provided that the granting of only five licenses is technically feasible within the limits of spectrum available for PCS. Should it be possible at some future point, however, to technically accommodate more licenses through advances in spectrum sharing capabilities (e.g., spread spectrum technology), the Commission should not hesitate in awarding additional PCS licenses.

III. THE COMMISSION SHOULD CONSIDER SMALLER SERVICE AREAS, INCLUDING MSAS AND RSAS

In the Notice, the Commission seeks comments on a range of potential license service areas, ranging from nationwide licenses to the 487 "Basic Trading Areas" as defined in Rand McNally's 1992 Commercial Atlas & Marketing Guide. It is difficult at this juncture in the development of PCS to predict with much certainty what constitutes an appropriately-sized service area since this depends, in large part, upon the types of services developed.

For example, the Commission states that "the primary focus of PCS will be to meet communications requirements of people on the move." (para. 30). It is unclear from this statement, however, whether "on the move" refers to vehicular

traffic, which is a primary component of cellular service, or pedestrian traffic, which is the focus of current PCS research efforts. Whereas the high-speed mobility associated with cellular may warrant larger size serving areas, it is not clear that similar or larger size serving areas (the latter being proposed in the Notice) are required for low-mobility, pedestrian communications which could be a central feature of PCS.

Moreover, as the Commission recognizes, in some instances, "potential PCS licensees may be interested in serving only their local service areas...." (§59). The geographic-population density of New York City, and even specific boroughs like Manhattan, suggests one case where limited service areas could be attractive to several potential PCS providers. In addition, a cable TV operator might be able to take advantage of a PCS service area limited to the size of its cable TV franchise area, integrating a "wireless loop" into its existing cable TV infrastructure for the provision of residential telephone service.

The NYDPS recommends that the question of smaller service areas be one of the issues addressed in a Further Notice of Proposed Rulemaking. In particular, we urge the Commission to reconsider the applicability of MSAs and RSAs as licensing areas for PCS. In addition to providing the potential for broader

participation by firms in the development and provision of PCS, MSAs and RSAs also have the advantage of familiarity to the industry, regulators, and the financial community, as they have been used in determining license service areas for cellular, and more recently, interactive video and data services.

As to the Commission's concerns that smaller service areas would lead to consolidation similar to what has occurred in the cellular industry, we believe it is premature to make such an assertion at this time given the uncertainties surrounding how PCS will develop. Should such consolidation prove to be economically warranted, however, we believe that decision is best made by the competitive marketplace.^{1/}

IV. LOCAL EXCHANGE CARRIERS AND CELLULAR CARRIERS SHOULD NOT BE PRECLUDED FROM PROVIDING PCS WITHIN THEIR EXISTING SERVICE AREAS

The Notice asks whether cellular carriers and local exchange carriers should be permitted to obtain licenses for PCS. The NYDPS does not believe these service providers should be

^{1/}Smaller service areas need not preclude efficient regional and nationwide roaming. On the contrary, by maximizing the number of PCS providers per service area, as discussed in Section II, competition among those providers should help ensure that regional and nationwide roaming is provided in an efficient, low cost manner that is responsive to consumers' needs. Should marketplace forces fail to provide for the competitive offering of regional and nationwide roaming, however, the Commission may need to act.

excluded from applying for PCS licenses. Instead, we support eligibility requirements based on a potential service provider's ability to further the public interest. If LECs can employ new technologies to improve basic telephone service, for example, they should not be precluded from so doing. Similarly, if cellular carriers and other existing service providers (e.g., cable TV operators) can enhance their services to the public through the use of new technologies, they too should not be precluded solely because of their current position in the market place.

Where a PCS applicant or its affiliate currently holds a license for some other portion of the radio spectrum, however, it first must demonstrate its need for an additional allocation. To the extent that an existing service provider is capable of providing PCS using its current cellular spectrum, the NYDPS believes that allocating an additional PCS license to that applicant is unwarranted. Instead, the new spectrum for PCS can be better used to encourage greater competition by allowing for a larger number of participants in any given area.

However, if current cellular licensees (including LECs) are unable to use their existing spectrum allocation to provide PCS, these entities should not be precluded from applying for PCS licenses within their existing service areas. On the other hand,

these entities should not be awarded an automatic set-aside for PCS spectrum, as occurred with cellular spectrum. Whereas the Bell System was recognized as the primary proponent and developer of cellular technology -- thus the justification for a LEC set-aside -- this is not the case for PCS. In fact, of the hundreds of experimental license requests received by the FCC in the past several years, the majority have come from non-LEC interests. Moreover, providing a set-aside for LECs could restrict the potential for local exchange competition from non-LEC service providers, especially where the number of licenses available per service area is limited. Nor do we believe there is there sufficient justification to support set-asides for other service providers (e.g., cellular and cable TV companies).

While we oppose set-asides as a general matter, it may be that preferences are appropriate in certain instances based on demonstrated merit and where such preferences are consistent with the objective of encouraging PCS competition. For example, there may be merit to considering a preference in the case of a LEC whose current cellular spectrum allocation is insufficient for the provision of PCS and that LEC's ability to deploy PCS (e.g., wireless loops) would substantially reduce service costs and improve service quality for its current wireline customers.

However, we recommend that the same criteria as

outlined above for awarding spectrum to existing cellular providers be employed in considering a LEC's eligibility for a PCS license. Thus, where a LEC currently holds a cellular license in its wireline service area and its cellular spectrum can be used to provide PCS (including wireless loops), that LEC should be precluded from applying for a PCS license in that market. If, however, the LEC can demonstrate that its existing cellular spectrum allocation is insufficient for the provision of PCS, then it should not be precluded from applying for a PCS license. Further, where a LEC wishes to maintain its cellular separate subsidiary in the absence of a regulatory requirement to do so, the Commission should allow only the LEC or its cellular subsidiary -- but not both -- to apply for a PCS license.

V. PRIVACY IMPLICATIONS OF
PCS SHOULD BE ADDRESSED

Although PCS is still in its early stages of development, it is not too early to consider the privacy implications of PCS. For example, there is the potential for calls to be intercepted in those instances where wireless loops substitute for copper drop wires running to the subscriber's premises in conjunction with landline telephone service and where PCS handsets are used to place calls.

The NYPSC has been concerned for some time with the

privacy implications posed by the introduction of new services. In March 1991, the NYPSC adopted a policy statement on privacy comprised of eight principles to address its concerns.^{2/} Moreover, subscriber privacy was identified as a central component of the NYPSC's recently adopted PCS policy statement. Specifically, the NYPSC determined that:

PCS providers should incorporate privacy protections into the design and development of PCS technology. In doing so, PCS providers should be guided by our Privacy Principles. Where technology alone cannot adequately address all of the privacy implications of PCS, at a minimum, providers should make explicit in marketing PCS to consumers the privacy levels associated with various forms of PCS.

The Commission's current proceeding provides an ideal time for it to address the privacy implications of PCS, before large financial investments are made in technology which may compromise user privacy. Thus, our earlier proposal that the Commission institute a Further Notice of Proposed Rulemaking should include a section on the privacy issues raised by this new technology.

^{2/}Case 90-C-0075, Statement of Policy on Privacy in Telecommunications, issued and effective March 22, 1991.

VI. THERE SHOULD BE A PRESUMPTION THAT PCS
WILL BE USED PRIMARILY TO PROVIDE
COMMON CARRIER TYPE SERVICES

The Notice asks for comment on whether the PCS should be classified as a common carrier or private land mobile radio service (§195). In 1982 Congress established a clear demarcation between private and common carrier land mobile services. House Conference Report No. 97-675, P.L. 97-259, Communications Amendments Act of 1982, reprinted in 1982 U.S. Code Cong. & Admin. News 2237, 2298 (Conference Report). It intended that the distinction between private land mobile and common carrier services be "a functional one." Conference Report at 2299. According to the Conference report, the standard is whether or not a particular entity is engaged functionally in the provision of telephone services or facilities of a common carrier as part of the entity's service offering. If so, the entity is deemed to be a common carrier. Conference Report at 2299.

On the other hand, private line mobile service is defined as "a mobile service which provides a regularly interacting group of base, mobile, portable, and associated control and relay stations (whether licensed on an individual, cooperative, or multiple basis) for private one-way or two-way land mobile radio communications..." 47 U.S.C. §155(gg). Private

land mobile services are typically provided by public safety, industrial, business and land transportation users which operate their own private one-way and two-way land mobile services for the purpose of facilitating their operations. Congress recognized the importance of allowing small businesses and government agencies to obtain spectrum for the purpose of conducting their businesses.

The Conference Committee made clear that "the Commission should be ever vigilant to promote the private land mobile spectrum needs of police departments and other public agencies which need to use such radio services to fulfill adequately their obligations to protect the American public." The Conference Report at 2296. In allocating spectrum for this service, Congress intended it be used to provide dispatch services and not to provide common carrier message service. Conference Report at 2300. That this spectrum is to be used for dispatch service is supported by the express language of Section 332(c)(1) which by its terms applies to "services provided by specialized mobile radio, multiple licensed radio dispatch services, and all other radio dispatch services."

As discussed earlier, it is difficult at assess with any degree of certainty how PCS will develop. However, some guidance as to potential PCS services may be provided by

examining the various services currently being tested under experimental license authority.

As the Notice indicates, the services being tested include CT-2, CT-2 Plus, CT-3, PCN, wireless PBX and wireless local loop. An examination of the Notice's description of these services (footnote 16) suggests that with the exception perhaps of wireless PBX service, the other services resemble common carrier services. For example, CT-2 and CT-2 Plus can each be used as a "portable pay phone" (footnote 6), while CT-3 allows the customer's handset "to receive as well as to initiate calls," presumably to or from any subscriber to the public switched telephone network or a cellular system.

In addition, our experience in New York suggests that "telepoint" services (i.e., CT-2 and CT-3) are intended to be common carrier services. In September 1991, the NYPSC approved a tariff offered by Personal Communications Systems to resell telecommunications services. Specifically, the company expressed "no interest in provision of connection in the private environment . . . but rather the provision of access to the public telephone network through public base stations." (Attachment B, p. 2.) Similarly, where PCS is provided through a network independent of, but connected to the existing wireline public switched telephone network, that PCN provider should be

treated as a common carrier to the extent the services it offers are functionally equivalent to common carriage.

Lastly, where PCS is employed as a substitute for wireline facilities in provision of common carrier message service, there should be no question that the wireless loop service is a common carrier offering.

VII. INTERCONNECTION

The Notice also requests comment on the types of interconnection arrangements that should be available to PCS providers. The NYDPS believes that PCS providers should be entitled to obtain a type of interconnection that is reasonable for their particular system and is no less favorable than that offered by the LEC to its own affiliate, any other customer or carrier. Ensuring comparably efficient interconnection arrangements to PCS providers is one of the central components of the NYPSC's recently enacted policy statement. Specifically, the NYPSC concluded that:

carriers should make available to PCS providers under tariff comparably efficient interconnection arrangements. The terms and conditions of those tariffs should be consistent with those provided to other service providers. At the same time, interconnection arrangements that may be better suited for the provision of PCS should not be precluded.

We disagree, however, that the mere existence of intrastate interconnection arrangements may be "infeasible" for PCS, or that such arrangements would negate federal policies, as discussed more fully below.

VIII. PREEMPTION IS IMPERMISSIBLE

The Notice specifically seeks comment on whether the state regulation of PCS should be preempted if the Commission classifies these services as common carrier. (§97). It also asks for comment on whether the Commission should preempt state regulations governing the terms, conditions and rates for PCS interconnection with the public switched telephone network (§103). The Commission questions whether state regulation would "thwart or impede" federal policies.

As we have asserted many times before, §152(b) of the Communications Act fences off from Commission authority all matters "for or in connection with intrastate communications services." As the Notice points out, the Commission cannot predict precisely how PCS providers may want to interconnect with the local exchange carriers (§101), nor is it possible to know with any certainty the types of services which will be developed since that will depend upon developments in technology and the

market's response. Therefore, as various types of services develop different regulatory responses are possible.

Nevertheless, the Commission asks the parties to hypothesize now about what those responses will be and provide guidance. As the Court in California v. FCC, 905 F.2d 1217, 1243 (9th Cir. 1990) indicated, the Commission bears the burden of justifying any preemption order by demonstrating that the specific order is narrowly tailored to preempt only such state regulations as would negate valid regulatory goals.

Moreover, the efficient introduction of new services can be accomplished using a variety of different approaches. As recent history has demonstrated with respect to interconnection arrangements for competitive access providers, it is entirely possible that individual states will adopt regulatory policies that also encourage the development of new technologies and new services. Thus, the Commission simply may not preemptively oust the states. As the Supreme Court made clear in Louisiana v. FCC, 106 S.Ct. 1890, 1902 (1986), it is inevitable that jurisdictional tensions will arise as a result of the fact that interstate and intrastate services are provided by a single integrated system but this is not a basis for preemption.

Furthermore, the Commission need be mindful that the Supreme Court in Louisiana indicated it would tolerate preemption

only in the extreme circumstance where state policy would render interconnection to the interstate network impossible. Louisiana at 1902, fn. 4. Inasmuch as the Commission acknowledges that it does not know how PCS providers will need to interconnect with the public switched telephone network or the types of services to be provided, it is simply premature, at best, for the Commission to create a jurisdictional confrontation. And, recent state actions such as those in New York make it unlikely that state actions will negate legitimate federal policy.

Thus, as a matter of fact and law the Commission may not determine that state policy on interconnection or on intrastate PCS service will negate legitimate federal goals.

CONCLUSION

The NYDPS supports the introduction of PCS because of its potential benefits to consumers. We believe it is premature, however, for the Commission to establish specific rules for PCS. By acting in haste, the Commission may unintentionally limit the full potential of these new services.


As a policy matter, the NYDPS favors a licensing structure which will maximize the potential number of service providers. Moreover, special restrictions should not be imposed on the allocation of PCS spectrum to cellular carriers and LECs

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within their existing service areas, provided they demonstrate the need for additional spectrum.

The Commission should consider the privacy implications of PCS before large financial investments are made in technology which may unnecessarily compromise user privacy. Inasmuch as it appears likely that PCS will be used to provide common carrier services, we recommend the Commission make a presumption that PCS should be regulated as a common carrier rather than private land mobile service. As a final matter, preemption of states policies on interconnection and on the intrastate provision of PCS would be unjustified.

Respectfully submitted,



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Penny B. Rubin
of Counsel

Dated: November 6, 1992
Albany, New York

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

CASE 91-C-0960 - In the Matter of Establishing Policy Principles
for Personal Communications Services (PCS).

STATEMENT OF POLICY ON
PERSONAL COMMUNICATIONS SERVICES (PCS)

Issued and Effective: October 30, 1992

STATE OF NEW YORK
PUBLIC SERVICE COMMISSION

COMMISSIONERS:

Peter Bradford, Chairman
Lisa Rosenblum
James T. McFarland
Henry G. Williams
William D. Cotter

CASE 91-C-0960 - In the Matter of Establishing Policy Principles
for Personal Communications Services (PCS).

STATEMENT OF POLICY ON
PERSONAL COMMUNICATIONS SERVICES (PCS)

(Issued and Effective October 30, 1992)

BY THE COMMISSION:

By Notice issued November 21, 1991, we invited comments on a staff analysis entitled Statement of Policy Principles for Personal Communications Services (PCS) ("Staff Report").¹ Broadly defined, PCS is an emerging form of radio communications services that provide individuals with the ability to communicate with others at any place and at any time.

1. Case 91-C-0960, Notice Soliciting Comments, (issued November 21, 1991).